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CLEARINGHOUSE RULE 98-174

Comments

[NOTE: All citations to “Manual” in the comments below are to the Administrative Rules Procedures Manual, prepared by the Revisor of Statutes Bureau and the Legislative Council Staff, dated September 1998.]

2. Form, Style and Placement in Administrative Code

a. The arrangement of the rule does not conform to the preferred drafting style. In particular, the arrangement of the rule-making order does not conform to s. 1.02, Manual, as the draft order does not include an introductory clause, plain language analysis or effective date clause. Also, ch. PSC 100 should be repealed and recreated in a SECTION 1, which would state: “SECTION 1. Chapter PSC 100 is repealed and recreated to read:”. [See s. 1.04 (1), Manual.]

b. Both subchapter titles immediately follow the chapter title. The title to subch. II should be moved to the location in ch. PSC 100 where subch. II begins.

c. Once a term is defined in a rule, the defined term should be used, and its use should be consistent. This drafting principle was not followed in the definition of “available economic capacity” in s. PSC 100.12 (4). In this definition, “economic capacity” should be substituted for the phrase “amount of generating capacity meeting the definition of economic capacity.” Also, a second definition of “native load” should not be provided within the definition of “available economic capacity,” as “native load” is defined in s. PSC 100.12 (10).

d. The preferred drafting style is not to parenthetically embed the definition of a second term within the definition of another term. This style was not followed in the definition of “economic capacity” in s. PSC 100.12 (6), which also contains a definition of “long-term firm purchase contracts.” If the latter term is used only in sub. (6), a separate sentence in that subsection should state: “In this subsection, “long-term firm purchase contract” means a contract with”

e. Mandatory duties should be noted in a rule through the use of “shall”; an optional provision or discretionary authority should be denoted through the use of “may.” A prohibition should be stated as “no person may . . .” or “a person may not” In addition, “should,” “could,” “would,” “will” or “must” should not be used to express a mandatory or permissive action. [See s. 1.01 (2), Manual.] This drafting style was not followed in numerous provisions throughout the rule. See, for example, ss. PSC 100.13 (1) (b) (intro.), 100.15 (1) (intro.) and (a) and 100.165 (2).

f. The use of parentheses is not the preferred drafting style. [See s. 1.01 (6), Manual.] Parentheses were used, for example, in ss. PSC 100.12 (6) and 100.15 (1) (a). The parenthetical material throughout the rule should be deleted or worked into the text of the rule or, if it is not substantive, placed in a note.

g. The rebuttable presumption in the definition of “passive investor” in s. PSC 100.12 (11) (a) is a substantive provision that should not be included in a definition. [See s. 1.01 (7) (b), Manual.]

h. In s. PSC 100.12 (11) (b), “par.” should precede “(a).”

i. In s. PSC 100.13 (1) (intro.), “pars. (a) and (b)” should replace “par. a and b of this subsection.”

j. Internal and external references to multiple provisions should be in the plural and references to alternative provisions should be in the singular. [See s. 1.07 (2), Manual.] This drafting style was not followed with the use of “ss.” in s. PSC 100.13 (1) (b) 3. and “ss.” in s. PSC 100.15 (2).

k. The subsection titles in s. PSC 100.14 should be in solid capital letters. The paragraph titles in s. PSC 100.15 (1) (e) and (i) should be written with only an initial capital letter. [See s. 1.05 (2), Manual.] In addition, since s. PSC 100.15 (1) and (3) have no titles, sub. (2) should not have a title. Also, for all of the section titles in the rule, only the first letter of the title should be capitalized.

l. The subdivisions in s. PSC 100.15 (1) (d) should begin in the left margin and be numbered 1., 2., and 3. [See s. 1.03 (5), Manual.]

m. The use of “thereof” in s. PSC 100.165 (intro.) and elsewhere in the rule is vague and should be avoided. [See s. 1.01 (9) (c), Manual.]

n. The preferred format to instruct the Revisor of Statutes to insert a date within the text of a rule is to refer to the “effective date of this (section, subsection, paragraph, subdivision) . . . (revisor inserts date).” This style was not followed in s. PSC 100.165 (1) to (3).

o. The preferred drafting style is to place a number other than “one” in the text of a rule in numeric form. It is redundant to also provide the same number in a text format. [See s. 1.01 (5), Manual.] This style was not followed in s. PSC 100.15 (1) (c), 100.165 (1) to (3) and 100.17 (2) (a) and (b).

p. References to subdivisions should include a period after each subdivision number. This was not done in ss. PSC 100.13 (1) (b) (intro.) and 100.17 (4) (b). [See s. 1.03 (5), Manual.] Also, in that paragraph, “such” should be deleted.

4. Adequacy of References to Related Statutes, Rules and Forms

a. The rule incorporates two standards by reference. See the “DOJ guidelines” in s. PSC 100.12 (5) and “FERC Order 592” in s. PSC 100.12 (7). Consent for incorporation of these standards must be obtained from the Revisor of Statutes and the Attorney General pursuant to s. 227.21 (2) (a), Stats. The analysis accompanying the rule should indicate that this consent has been given.

b. Depending upon the size of the Department of Justice (DOJ) guidelines and Federal Energy Regulatory Commission (FERC) Order 592, references in the rule to these two standards could be vague and difficult for an interested reader to find. The commission should review the rule to ensure that the references to applicable portions of these standards are unambiguous. See, for example, the reference to the definition of “adverse competitive effects” in the DOJ guidelines in s. PSC 100.13 (1) (b) 2., and the reference to mitigation remedies in FERC Order 592 in s. PSC 100.13 (2) (b). As another example, in s. PSC 100.13 (1) (b) 2. and (2) (a), it is not clear what is meant by “provided, however, that the commission has examined the issues in section 2 of the DOJ guidelines.”

c. The reference to “subsequent thresholds” in s. PSC 100.165 (1) is potentially confusing. If the commission intends that the 100 megawatt threshold be automatically revised whenever the threshold in s. 196.491 (3) (a), Stats., is amended, then sub. (1) should reference the threshold in s. 196.491 (3) (a), Stats., and indicate in the note that at the time that the rule was adopted, the threshold was 100 megawatts.

d. The reference in s. PSC 100.165 (1) to the over three year contract prohibition under s. 196.491, Stats., is vague; it should be to a more specific provision in s. 196.491, Stats.

5. Clarity, Grammar, Punctuation and Use of Plain Language

a. The commission should review the following undefined terms and phrases to determine if a definition of them should be provided in the rule to improve the clarity of the rule:

- (1) “Non-passive investor” in s. PSC 100.12 (11).
- (2) “Eastern Wisconsin Utility transmission-constrained area” and “market power clearance” in s. PSC 100.165 (2).
- (3) “Wholesale merchant peaker plant” in s. PSC 100.165 (3).
- (4) “Complex contracts” in s. PSC 100.17 (3).

b. The commission should review the entire rule to ensure that treatment of lists of provisions are clear, grammatically correct and conform to preferred drafting style. Under the

preferred drafting style, an introduction to the list indicates whether the elements of the list are inclusive or exclusive, i.e., “. . . all of the following:”, or “any of the following:”, and each element ends with a period. This style was not followed in a number of provisions in the rule, including ss. PSC 100.12 (11), 100.13 (1) (a) and (b), 100.15 (1), 100.16 (1), 100.165 (intro.) and 100.17 (2).

c. Placement of “to a seller” before “means” in the definition of “market power” in s. PSC 100.12 (9) makes this definition ambiguous. Should “of a seller” follow “ability” in this definition?

d. It is not apparent why the note following s. PSC 100.12 (13) indicates where Appendix B of FERC Order 592 may be obtained when the text of the rule is not limited to Appendix B but includes all of the order. See s. PSC 100.13 (2) (b).

e. In s. PSC 100.13 (1) (a) 2., “their” should replace “its.”

f. To improve the grammar of the rule, the commission should place an article such as “the” before “applicant” in a number of provisions in the rule. See, for example, ss. PSC 100.14 (2) (b) and (3), 100.15 (1) (f) and 100.16 (1) (a) and (b).

g. The circumstances under which the commission will waive information requirements under s. PSC 100.15 (3) (c) are vague. Can the commission specify criteria that it will use to waive these requirements? Also, “at its discretion” is unnecessary since the word “may” is used.

h. In the last sentence of s. PSC 100.165 (1), (2) and (3), “made” should replace “requested.”

i. In s. PSC 100.17 (4) (a) (intro.), the final clause is ambiguous. If the commission is given discretion to take any of the three actions, the clause should state “the commission may do any of the following:”. If the commission is required to take one or more of the three actions, the clause should state “the commission shall do at least one of the following:”.